

January 15, 2008

UNITED STATES COURT OF APPEALS

Elisabeth A. Shumaker
Clerk of Court

FOR THE TENTH CIRCUIT

In re:

ROLLAND G. BERRETH,

Movant.

No. 07-3312
(D.C. No. 5:07-CV-3257-SAC)
(D. Kan.)

ORDER

Before **TACHA, MURPHY**, and **TYMKOVICH**, Circuit Judges.

Movant Rolland Berreth, a former Kansas state inmate now on supervised release and proceeding pro se, has filed a motion for authorization to file a second or successive 28 U.S.C. § 2254 habeas corpus application under 28 U.S.C. § 2244(b). We deny leave.

Berreth was convicted in 1994 in Kansas state court of aggravated kidnaping and aggravated sodomy. He was sentenced to 254 months' imprisonment. He filed a § 2254 application collaterally challenging that conviction which was denied by the district court because of procedural default. This court denied him a certificate of appealability. *Berreth v. McCune*, No. 99-3118, 2000 WL 912893, at *3 (10th Cir. July 7, 2000).

Berreth filed a second § 2254 application in federal district court in October 2007. Having no jurisdiction to entertain a second or successive § 2254 application without authorization from the appropriate circuit court, the district court transferred the matter to this court. *See Spitznas v. Boone*, 464 F.3d 1213, 1217 (10th Cir. 2006); 28 U.S.C. § 2244(b)(3). Berreth has now filed a motion requesting remand to the district court.

To obtain permission to file a second or successive § 2254 application, Berreth must show that he has not raised his claim in a previous habeas application, 28 U.S.C. § 2244(b)(1). He must also show (1) that his new claim either “relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,” *id.* § 2244(b)(2)(A); or (2) depends on facts, previously undiscoverable through the exercise of due diligence, that would “establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense,” *id.* § 2244(b)(2)(B).

Berreth argues that this application is not an attempt to file a second or successive habeas application but, instead, that it stems from a new conviction and new sentence. Berreth apparently bases this theory on the fact that, after his first unsuccessful federal habeas proceeding, a Kansas state court granted him post-conviction relief under Kan. Stat. Ann. § 22-3504, determining that Berreth’s convictions for aggravated kidnaping and aggravated criminal sodomy were

multiplicitous. That court set aside the conviction for aggravated kidnaping, resentenced Berreth to a shorter term of imprisonment, but lengthened his period of supervised release. Applying new case law, the Kansas Court of Appeals reversed the grant of post-conviction relief and directed the reinstatement of Berreth's original convictions and sentence. *State v. Berreth*, No. 94,310, 2007 WL 806002, at *5 (Kan. Ct. App. Mar. 16, 2007). The Kansas Supreme Court denied review.

Contrary to Berreth's theory, the actions of the Kansas Court of Appeals and the Kansas Supreme Court in his state post-conviction proceedings did not transform the present matter into a new conviction and/or new sentence for purposes of 28 U.S.C. § 2244. Berreth's ex post facto claim, while it did not arise until after the ruling of the Kansas Court of Appeals in the post-conviction proceeding, ultimately depended on Berreth's multiplicity claim. Berreth has failed to show that his multiplicity claim satisfied the standards set out in 28 U.S.C. § 2244(b). To the extent Berreth raises an ineffective-assistance-of-appellate-counsel argument in this motion to remand, that claim is similarly

deficient because it does not involve a new rule of constitutional law nor does it rely on previously undiscoverable facts.

The motion for remand is DENIED.

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a long horizontal flourish.

ELISABETH A. SHUMAKER, Clerk